SERVED: October 1, 1992

NTSB Order No. EA-3679

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of September, 1992

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| THOMAS C. RICHARDS,<br>Administrator,<br>Federal Aviation Administration,<br><br>Complainant,<br><br>v.<br><br>WALLACE N. EVANS, II, M.D.,<br><br>Respondent. | Docket SE-12081[1] |

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on March 10,

[1]Respondent incorrectly listed the docket number of this case as 140-EAJA-SE-12081. Despite the law judge's efforts to clarify matters to respondent (see Tr. at 5-8), there is obviously still some misunderstanding about the processing of subsequent claims under the Equal Access to Justice Act ("EAJA"). The number respondent has used is an example of an EAJA docket number. We are not yet at that stage. Only after the Board has heard an appeal, is an EAJA claim ripe.

1992, following an evidentiary hearing.[2] We deny the appeal.

On August 13, 1991, the Administrator issued an emergency order revoking respondent's pilot and medical certificates for violating Federal Aviation Regulation § 67.20(a)(1) ("FAR," 14 C.F.R. Part 67).[3] The Administrator charged that respondent provided false information on two medical applications. Subsequent to the emergency order, respondent waived the 60-day statutory time limit for Board processing of the case, and the Administrator amended the complaint.

As amended, the complaint charged that, on his May 1, 1989 and October 10, 1990 medical applications, respondent made two fraudulent or intentionally false statements: 1) in denying "Nervous trouble of any sort" in Item 21(m) of the applications; and 2) in failing to report use of Lithium and Prozac in Paragraph 15 (which reads "Currently use any medication" and seeks its "type and purpose"). The Administrator further charged that, as a result, respondent lacked qualification to hold the pilot and medical certificates.

The law judge did not make findings regarding respondent's answer to Item 21(m) or the allegation that respondent was taking

[2]The initial decision, an excerpt from the hearing transcript, is attached.

[3]§ 67.20(a)(1) provides:

(a) No person may make or cause to be made--

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part[.]

Prozac. He focused instead on the Administrator's claim that respondent had fraudulently or intentionally falsely failed to report on the applications his use of Lithium.

At the hearing, an FAA Air Surgeon who reviewed respondent's pharmacy records (see Exhibit A-1) testified that, over an 864-day period, 2,700 Lithium tablets were prescribed (Tr. at 80). The records showed that all these prescriptions were filled. The law judge implicitly rejected respondent's testimony that he had taken the Lithium only infrequently.[4] The law judge noted that the prescriptions continued and were refilled, and pointed to a similar failure to note this medication in other correspondence with the FAA. Tr. at 186-187. Having been a medical examiner for the FAA, respondent "certainly knew or should have known the effect the use of Lithium would have." Tr. at 185.[5] The law judge concluded that respondent had attempted to avoid reporting the Lithium by theorizing that, if he did not take this medication during, shortly before, or shortly after the time of

[4]Respondent testified that he took Lithium during the following times: approximately 1 week in April 1989; from July 11, 1989 to February 1990; from July 20, 1990 to September 8, 1990 or thereabouts; from Thanksgiving 1990 through February 1991, and for a few weeks in mid-March and April of 1991. Tr. at 128-137. He also stated that his wife had a habit of refilling prescriptions and they could have been refilled and stored in the house without him knowing. Tr. at 130-131.

[5]The FAA witness testified that a medical certificate has never knowingly been issued to a person taking Lithium, and doubted one ever would. Tr. at 57-58. He went on, however, to speak of a process by which questionable cases were further examined, with the possibility that a certificate might ultimately be issued.

his application, he could state that he was not currently taking it. This, in the law judge's view, resulted in an intentionally false statement.

On appeal, respondent alleges that the preponderance of the evidence does not support the law judge's finding that respondent made an intentionally false statement. Respondent first claims that he truthfully answered the question in accordance with common use of the word "currently." He then argues that the record does not support a finding that he had the necessary knowledge of the statement's falsity (i.e., that he intentionally made the false statement).[6]

We cannot agree with either contention. In reaching our conclusion, we need not undertake the comprehensive analysis of the word "currently" that respondent seems to urge. Instead, we need only refer to the facts of this case.

We agree with respondent that the phrase "currently use any medication" must be read as it would be normally and reasonably understood. We, however, must conclude that the filling of prescriptions totalling well over 2,000 pills during the relevant period supports a finding of current use. We further find it beyond question that the application is not unlawfully vague as to respondent. It clearly seeks information that will fairly

[6]See Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976) (elements of an intentionally false statement are a false representation in reference to a material fact, and made with knowledge of its falsity).

inform the FAA regarding his medical treatment. Perhaps at the time of the first application respondent had no intention of taking additional Lithium and, therefore, it might have been acceptable not to report it at that time. But, by the date of the second application, there is no doubt that, even if respondent's testimony regarding the extent of use (see footnote 4, supra) were accurate, Lithium was a recurrent and standard part of his treatment to the extent that a reasonable person would consider it a medication currently in use. We, thus, reject respondent's suggestion that the application, as applied to him, is ambiguous, unclear, and unfair.

We also see no basis to overturn the law judge's finding that respondent had the requisite knowledge. Respondent's claim that the law judge somehow failed to make the necessary findings misinterprets our precedent. Here, the law judge made the finding that we found lacking in Administrator v. Motrinec, NTSB Order EA-3296 (1991), a case where the law judge failed to address respondent's knowledge of the truth or falsity of a representation. Here, the law judge cited to respondent's prior position as an FAA medical examiner and his failure to mention the Lithium in various material and correspondence (see Exhibits A-2 and 5), both of which contributed (albeit circumstantially) to the law judge's conclusion that respondent's omissions were intentional. Moreover, respondent offers nothing to undermine the law judge's conclusion that respondent was attempting to

evade the application's intent (and therefore knew that intent) when he chose to stop taking Lithium before the application and medical exam and to start again afterwards.[7] In view of our finding that respondent's interpretation of the application's requirements was unreasonable, this evidence is sufficient to find a violation of § 67.20(a)(1). And, as the Administrator notes, Administrator v. Jones, SE-5683 (1983) was not heard by the Board (the appeal having been dismissed). The law judge's initial decision there provides no precedent. 49 C.F.R. 821.43.

Finally, respondent urges that the sanction be reduced to a suspension or revocation of his medical certificate only.[8] He suggests that this case does not present the degree of violation that would justify the strict sanction imposed.

The cases respondent cites, however, while offering some examples where revocation was ordered, by no means show the scope of situations where revocation has been found appropriate. The law judge found, and we have affirmed, that respondent intentionally provided inaccurate information to the FAA.

> The maintenance of the integrity of the system of qualification for airman certification, which is vital to

[7]Indeed, other testimony supports this reading of respondent's intent. See Stratas deposition at 17, 72 (respondent would not take the medication during the licensing process).

[8]Although respondent also addresses that aspect of the complaint related to Item 21(m) ("Nervous trouble of any sort"), we need not. As discussed infra, resolution of this aspect of the complaint is not necessary to affirm the Administrator's order.

> aviation safety and the public interest, depends directly on the cooperation of the participants and on the reliability and accuracy of the records and documents maintained and presented to demonstrate compliance.

Administrator v. Cassis, 4 NTSB 555, 557 (1982), recon. den'd, 4 NTSB 562 (1983), aff'd Cassis v. Helms, Admr., FAA, et al., 737 F.2d 545 (6th Cir. 1984). See also Administrator v. Rea, NTSB Order EA-3467 (1991) (one intentional falsification in one application warrants revocation; falsification is a serious offense which in virtually all cases the Administrator imposes and the Board affirms revocation).

**ACCORDINGLY, IT IS ORDERED THAT:**

Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.